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OCT 2 1972

CLERK, SUPREME COURT, U.S.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

No. 71-1031

LEONARD TONASKET, *Appellant*,

v.

THE STATE OF WASHINGTON AND
THE SUPERVISOR OF THE TAX COMMISSION OF
THE STATE OF WASHINGTON, *Appellees*.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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BRIEF OF APPELLEES

STATUTES INVOLVED

Appellees cannot accept the appellant's statement of "Constitutional Provisions, Statutes and Regulations Involved." (App. Br. 5-7)

The only statutes, regulations and constitutional provisions involved in this appeal are:

1. Public Law 83-280 (67 Stat. 588 (1953), 18 USC § 1162; 28 USC § 1360) (hereinafter referred to as PL 83-280), set out on pages A-8 through A-12 of the appellant's

brief, which authorizes assumption by the states of criminal and civil jurisdiction over causes of action to which Indians are a party which arises on Indian reservations.

2. Sections 37.12.010 and 37.12.021 of the Revised Code of Washington (RCW), pursuant to which Washington assumed full criminal and civil jurisdiction over the Colville Confederated Tribes as authorized by PL 83-280. (Appendix A, p. 67.)
3. Chapter 82.24 RCW, the Washington Cigarette Tax Act, §§ 82.24.030 (Appendix B, p. 68), 82.24.050 (App. Br. A-28), 82.24-.110 (App. Br. A-29), the enforcement of which has given rise to the controversy in question.
4. Chapter 82.32 RCW, general administrative excise tax provisions, §§ 82.32.030 (App. Br. A-30) and 82.32.290 (App. Br. A-33).
5. United States Constitution, Art. I, § 8, Cl. 2, which provides in pertinent part:

   "The congress shall have power * * * "* * *

   "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; "* * *"
6. 25 USC §§ 261-264 (19 Stat. 200, 1876), the Indian Traders Act (App. Br. A-1 and A-2).
7. 25 CFR § 251 *et seq.* (1965), the Bureau of Indian Affairs' regulations concerning Indian traders (Appendix C, p. 70).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Appellees do not accept the appellant's statement of questions presented.

Appellees submit that the question presented is:

Did the state of Washington, in assuming civil and criminal jurisdiction over the Colville Indian Tribe and its members, to the full extent authorized by PL 83-280 and RCW 37.12.021 and in accordance with the Colville Business Council Resolution 1965-4 and the governor's proclamation assuming jurisdiction over the Colville Tribe of January 29, 1965, remove any existing impediment which might otherwise preclude the state of Washington from enforcing its cigarette tax laws against the appellant in conducting a retail cigarette business on his restricted land on the Colville Tribe reservation?

STATEMENT OF THE CASE

Appellees cannot accept the appellant's statement of the case. The material set forth in Appendices A, B and C to appellant's brief is not a part of the record in this cause. The Colville Tobacco Ordinance (App. Br. A-23 through A-28), Washington Laws 1972, 2nd Ex. Sess., chapter 157 (App. Br. A-34 through A-43), are not properly before the court. In addition, the letters set forth on pages 3-5 of the Single Appendix were submitted to the supreme court of Washington at the time of argument and were never introduced in evidence. Except for the pleadings and admissions of counsel, the evidence in this cause consists of three exhibits (R. 94-112, 113, 114) and the testimony of the appellant (Single App. 27-40). Thus, a major portion of the appellant's

statement of the case and argument concerns matters not a part of the record in this cause.[1]

Appellant, a full blood Colville Indian, owns allotted Indian land which he acquired by restricted deed from successors to the original allottee (Ex. 1, R. 96-112), on which he conducts his retail business. This land on which his business is located is in the city of East Omak, Washington, and on the Colville Indian Reservation in Eastern Washington. Of course, he is a citizen of the United States and a citizen and resident of Washington.[2] Were it not for the restrictions in the deeds of this property pertaining to encumbrances, alienation and taxation, there would be no way to distinguish this property from any other property in the city of East Omak and the county of Okanogan, Washington. Deeds to this land were conformed to Washington law descriptions and filed with the Okanogan County Auditor, Okanogan County, Washington (Ex. 1, R. 96-112).

The record does not show whether appellant lives on or off the reservation. Admittedly, at least

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[1]Furthermore, the briefs of amici curiae filed on behalf of appellant are replete with references to alleged facts and circumstances which are not a part of the record in this cause.

[2]As of June 2, 1924 (43 Stat. 253), all Indians were given United States citizenship status. The substance of the original act now appears as 8 USC § 1401, which declares:

"(a) The following shall be nationals and citizens of the United States at birth:

"* * *

"(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe; * * *"

This statute, coupled with Clause 1 of the 14th Amendment to the United States Constitution, made them citizens of the state within which they reside. *Re Heff*, 197 U.S. 489 (1905) at 504.

one-half of the Colville Tribe live off the reservation (App. Br. 8).[3]

Appellant's business is mainly that of selling cigarettes. He sells approximately 400 cartons each day. The tax on the 400 cartons of cigarettes would have been $440, which amounts to a loss of at least $13,200 per month in taxes to the state of Washington as a result of appellant's operations. His customers are Indians and non-Indians, but the majority are non-Indians (Single App. 41).

The appellant has operated without a license required by RCW 19.91.120, and has not registered with the state of Washington as required by RCW 82.32.030. Furthermore, he has not complied with the requirements of RCW 82.24.050, which imposes on the cigarette retailer the duty of affixing stamps to cigarettes sold at retail (Single App. 41). Appellant's retail business has not been regulated in any manner by any agency of the United States (Single App. 52).

In February, 1967, agents of the Washington State Department of Revenue entered the appellant's store and seized cigarettes which he had in stock (Single App. 42). They placed him under arrest and charged him with the crimes of (1) engaging in business without a valid registration certificate, as

[3]A fact sheet prepared by the Bureau of Indian Affairs which accompanied the Senate Report on S. 282 of the 90th Congress discloses that 75% of the Colville Tribe live off the reservation. (Hearing befor the Subcommittee on Indian Affairs of the Committee on Interior and Indian Affairs, House of Representatives, 90th Congress, Second Session on H.R. 3051, p. 52.)

required by RCW 82.32.030 and RCW 82.32.290; (2) engaging in the sale of cigarettes without a valid license to do so, as required by RCW 19.91.120; (3) having cigarettes in his possession without proper stamps affixed thereon, as required by RCW 82.24-.050; and (4) selling cigarettes without the proper stamps affixed thereto, as required by RCW 82.24-.050 (Single App. 7, 15).

After the information was filed against the appellant, he filed a complaint for a declaratory judgment (Single App. 6-13, 42). In his complaint he declared that he was and had been in the business of selling cigarettes without affixing the stamps required by state law. He further declared that it was his intention in the future to expand his mercantile operation and sell other items of merchandise, including but not limited to items of wearing apparel and appliances. He further alleged that it was his intention not to collect the tax imposed by statute upon sales in the state of Washington. He also declared his intention to become a vendor of liquor by the bottle, but later abandoned this declaration (Single App. 6-12, 42).

On January 30, 1965, the Colville Business Council issued its Resolution 1965-4 requesting that the governor of the state of Washington assume full and complete civil and criminal jurisdiction over the Colville Tribe, its members and the lands held in trust for it and its members (Single App. 23). Specifically, Resolution 1965-4 requested the following:

"IT IS HEREBY REQUESTED that the Governor of the State of Washington, in compliance with the aforesaid law, duly and regularly issue his proclamation to the effect that the State of Washington take full and complete jurisdiction over the Colville Confederated Tribes of the State of Washington, their territory, reservation, country and lands *to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state;* save and except as hereinabove provided." (Emphasis supplied). (Ex. 1, R. 95)[1]

This request was granted in a proclamation issued by the governor of the state of Washington on January 29, 1965 (Single App. 23, 46).

The action of the Colville Business Council and the governor concerning the assumption of jurisdiction by the state of Washington over the Colville Tribes was done pursuant to PL 83-280 and RCW 37.12.021. Based on this assumption of jurisdiction, the Washington supreme court found (1) that the state had jurisdiction to impose its laws of general application on the Colville tribal reservation subject to the exceptions enumerated in PL 83-280, and (2) that appellant's business activities do not fall among the exceptions (Single App. 21, 54).

The appellant appealed from this judgment.

ARGUMENT

Introduction

The controversy in this cause is limited to determining whether or not the appellant can sell ciga-

[1]The phrase "except as hereinabove provided" refers to game regulations (Ex. 1, R. 94).

rettes to persons not members of the Colville Tribe from his business location on the Colville Reservation free of any cigarette tax liability imposed on him as a retailer pursuant to applicable provisions of the state of Washington Cigarette Tax Act (chapter 82.24 RCW). RCW 82.24.050 imposes on a cigarette retailer the duty of fixing the state of Washington's cigarette tax stamps prior to the sale of cigarettes. This provision excepts from taxation cigarettes sold to qualified purchasers by federal instrumentalities and Indian tribal organizations. "Qualified purchasers," as used therein, has been determined by the Washington State Department of Revenue to include sales to enrolled members of a recognized Indian tribe when the sales are made within the exterior boundaries of the reservation occupied by the tribe. Cf. RCW 82.24.040. We are thus here concerned solely with the enforcement of the Washington cigarette tax against the appellant to the extent that he sells cigarettes to persons other than Colville Indians. We are not concerned otherwise with the appellant's business.

Because a substantial amount of the territory of the state of Washington is "Indian country" and because "Indian country" is next to or commingled with large population centers, tax-free sales of cigarettes by Indians to the general public pose a problem of significant magnitude to the state of Washington. The state of Washington's ability to effectively en-

force its cigarette tax law lies at the heart of this controversy.[6]

We are concerned with a class of retail activity which is not a subject of regulation under the Indian Traders Act (25 USC § 261, *et seq.*, 19 Stat. 200, 1876), or with the class of sales before this court in *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965).

This case also is not concerned with the application of PL 83-280 to a subject matter over which the United States Congress has specifically legislated. The underlying question in this cause is whether an

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[6]The following cases are pending pertaining to the question of whether or not Indians on or near the Puyallup Reservation, which is located near Tacoma, Washington, may sell cigarettes and other tobacco products without complying with the revenue laws of the state of Washington imposed on such selilng activities:

(a) *Jack Moses, Puyallup Tribe v. Kinnear*, United States Court of Appeals, Ninth Circuit, Docket Nos. 71-2605 and 71-2672.

(b) *Corwin King v. State*, Superior Court of Thurston County, Washington, Cause No. 45357.

(c) *Satiacum, et al. v. Kinnear, et al.*, U.S. District Court for the Western District of Washington, Southern Division, Cause No. 22-71C3.

(d) *Department of Revenue v. Moses, et al.*, Superior Court of Pierce County, Washington, Cause No. 260490.

In an effort to enforce its cigarette tax act and prevent widespread sales of cigarettes by Indians free of its cigarette tax, the Washington legislature amended the Washington Cigarette Tax Act in 1972 by requiring the tax to be paid on the first importation into the state and requiring that an importer be deemed to receive possession of the cigarettes for cigarette tax purposes when cigarettes being transported to Washington destinations and markets first cross Washington state lines. See Chapter 157, Laws of 1972, 2nd Ex. Sess. The Yakima Tribe, which has not ceded complete jurisdiction under PL 83-280, has challenged an assessment of $613,783.99 (including penalties and interest) for cigarette purchases by the Yakima Tribe for the months of March and April, 1972. (The Yakima reservation in which these cigarettes are sold to the public is near Yakima, Washington.) The validity of this assessment is now pending before the Washington Board of Tax Appeals as Docket No. 72-13. In support of the 1972 cigarette tax legislation, the Washington Department of Revenue's Research Division estimated Indians' cigarette tax sales accounted for a loss of $5.7 million per year to the state of Washington.

exemption from the Washington cigarette tax can be implied in light of PL 83-280.

As will be developed in the argument portion of this brief, it is the appellees' position that:

1. PL 83-280 encompasses a specific grant of tax jurisdiction to the states, subject to only the exceptions set forth therein and any other federal legislation which expressly limits a state's taxing power. This argument is supported by examination of the specific language of PL 83-280, its history (Part 1 of the Argument), and by the cases which have referred to or interpreted and applied PL 83-280 (Part 3 of the Argument).

2. Even if PL 83-280 is construed to not expressly cover the subject of taxation, it removes any impediments to the extension of Washington's tax jurisdiction to Indians in Indian country subject to the exceptions contained in PL 83-280 and any other federal legislation which specifically prohibits state taxation (Part 2 of the Argument). Case law also supports this construction of PL 83-280 (Part 3 of the Argument).

3. There is no federal legislation which prohibits the imposition of the excise tax in question. The Indian Traders Act (25 USC §§ 261-264), and the Indian Reorganization Act (48 Stat. 984 (1934), 25 USC § 461 *et seq.*) relied upon by appellant are not in point for the reasons set forth in Part 4 of the Argument portion of this brief.

4. Without considering the effect of PL 83-280 on a state's taxing jurisdiction, the state of Washington can impose its general cigarette excise tax on appellant's retail cigarette sales activity in reference to the sales here involved, namely, sales of cigarettes to non-Colville Indians. Appellees contend that this result follows because of the lack of any federal prohibition and the inapplicability of any implied immunity (Part 5 of the Argument of Appellees).

Summary of Argument

As heretofore set forth, the state of Washington, in good faith and in conformity with the requirements of PL 83-280, and pursuant to the request of the Colville Tribes, has assumed full civil and criminal jurisdiction over the Colville Tribes, subject to the exceptions contained in PL 83-280. This assumption of jurisdiction removed any legal restriction which might prevent Washington from enforcing its cigarette tax act against appellant.

PL 83-280, by its express terms, pertains to federal-state relations. This includes both a territorial and a subject matter jurisdiction. In order to meet the admitted "law and order hiatus" on Indian reservations, this grant of jurisdiction requires the extension of a state's substantive laws to Indians on the reservation (see App. Br. 21). This is the clear import of the language of PL 83-280 construed as a harmonious w[illegible]e. The extension of state jurisdiction to civil and criminal causes of action cannot

logically be construed to involve only the jurisdiction of state courts.

PL 83-280, in addition to granting specific jurisdiction over "causes of action" specifically authorizes the extension of civil laws that are of general application to private persons or private property to Indians in Indian country (28 USC § 1360(a)), and leaves intact tribal ordinances or customs only to the extent "not inconsistent with applicable civil law of the state" (28 USC § 1360 (c)).

Under PL 83-280, the states are free to apply their general laws to Indians in Indian territory to the extent not in direct conflict with any federal statute. This legislation effected withdrawal of general federal jurisdiction and responsibility over Indians in Indian country and placed this responsibility squarely on the shoulders of the states which assumed jurisdiction according to its terms. A manifest purpose of PL 83-280 was to eliminate uncertainty of state jurisdiction over Indians in Indian country by eliminating many of the traditionally implied distinctions between the status of Indians and their reservations and the rest of the residents and territory of the states.

Extension of state laws of general application to Indians and their reservations includes extension of the obligations which result from these laws. One of the obligations is to pay state taxes on the conduct of general business activities to the extent not

specifically prohibited by PL 83-280 or some other federal statute. *Goudy v. Meath*, 203 U.S. 146 (1906).

Assuming, *arguendo*, as contended by the appellant and his amici curiae, that PL 83-280 is not concerned with the subject of taxation (which obviously is not the case, inasmuch as it specifically deals with this subject), the Cigarette Tax Act of the state of Washington is properly imposed on appellant's cigarette sales to persons not members of the Colville Tribe. This follows from the elementary proposition that the states have residual jurisdiction over Indian country and Indian affairs; and they can assert that jurisdiction in imposing taxes so long as imposition of the taxes is not expressly prohibited by overriding congressional policy. PL 83-280, if it accomplished no other purpose, removed any implied prohibition against the enforcement of state tax laws of general import against Indians on Indian reservations. It eliminates any tax-immunity argument based upon Indian tribal sovereignty, implied governmental immunity or federal preemption of jurisdiction over Indians on the reservation.

Any specific federal legislation, such as the Indian Traders Act, must be interpreted *in pari materia* with PL 83-280 and its scope limited to the specific subject matter there considered by Congress. The same is true with respect to exempt Indian property. Immunity from state taxation on PL 83-280 reservations cannot be implied from the Indian Traders Act since it is specifically addressed

to the *regulation* of traders with Indians and is not addressed to the question of state taxation of traders with Indians.

It is further appellees' position that apart from PL 83-280, Washington's cigarette tax is properly imposed upon appellant because (1) Washington has residual jurisdiction over Indians on Indian reservations, and (2) implied governmental immunity stemming from either tribal self-government or federal preemption has been narrowed by this court and no longer applies to strike down taxes that have an indirect or remote effect on a federal instrumentality or federal policy. The underlying rationale of this argument has been developed at some length in the Multistate Tax Commission's amicus curiae brief filed in this cause and in the causes of *Mescalero Apache Tribe v. Franklin Jones, et al.*, U.S. Supreme Court Docket No. 71-738, and *McClanahan v. Arizona State Tax Commission*, U.S. Supreme Court Docket No. 71-834. It is dealt with herein within the more limited context of this cause in Part 5 of the Argument.

1. **PL 83-280 Specifically Granted the State of Washington Jurisdiction to Impose And Enforce its Cigarette Tax Act Against an Indian Retailing Cigarettes to Non-Indians From a Business Located on an Indian Reservation.**

The supreme court of Washington, sitting *en banc*, by an opinion filed September 2, 1971, carefully analyzed the significance and operative effect

of the language of PL 83-280, and concluded that it authorized the state of Washington to extend the operation of its civil laws, including its tax laws, to Indians on Indian reservations except as specifically prohibited by its terms (Single App. 41-54). This conclusion of the Washington supreme court is specifically supported by the history and express provisions of PL 83-280.

PL 83-280 added a new section 1162 to Title 18 USC and a new section 1360 to Title 28 USC, pertaining to criminal and civil jurisdiction over Indians in Indian country.

> 18 USC § 1162 granted enumerated states:
> "* * * jurisdiction over offenses committed by or against Indians in the area of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the state * * *"

Section 1162 further provided as follows:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive

> any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Subsection (a) of 28 USC § 1360 granted jurisdiction over civil causes of action to the same extent that criminal jurisdiction was provided for in § 1162, and further provided:

> "* * * those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State * * *"

Subsection (b) of 28 USC § 1360 contained restrictions comparable to those in subsection (b) of 18 USC § 1162 in the following language:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

In addition, subsection (c) of 28 USC 1360 provided that:

> "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

In order to remove any legal impediment to the assumption of civil and criminal jurisdiction which might exist as a result of any Enabling Act for the admission of a state or which might otherwise exist, the Congress enacted §§ 6 and 7 of PL 83-280. In accordance with this consent, the state of Washington enacted RCW 37.12.021, which provides:

> "Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060." (RCW 37.12.060 except for addition of the word "tidelands" repeats the substance of 28 U.S.C. 1360 (b))

It is to be noted that though the consent of the tribe was not required by PL 83-280, the Washington legislature did not choose to exercise jurisdiction except by consent of the tribe.[6]

As heretofore indicated, the Colville Business Council requested the state to assume and Washington did assume full civil and criminal jurisdiction over the Colville Tribes and their land "to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state."

In enacting PL 83-280, the Congress was careful to reserve jurisdiction in areas of special concern to it. This included: (1) the protection of real or personal restricted or trust property, including water rights, from alienation, encumbrance or taxation by the states; (2) the freeing of the use of such property from any state regulation which is inconsistent with any federal treaty, agreement or statute, or with any federal regulation made pursuant thereto; (3) the protection of the Indians with respect to their hunting, trapping and fishing rights; and (4) the continuation of tribal self-government to the extent not inconsistent with any generally applicable civil law of the state.

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[6]A similar requirement was enacted by Congress when it amended § 7 of Public Law 83-280 by Public Law 98-284 (Title 4, § 401, April 11, 1968, 82 Stat. 78, now in 25 USC § 1321 (1968)). Before this amendment Washington did assume jurisdiction over eight specific subject matters dealing with the relationship of state laws of a public nature to private individual Indians in all established reservations (RCW 37.12.010, Appendix A, p. 67). *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), discussed this section and held that Washington could assume partial jurisdiction under PL 83-280 as it did under RCW 37.12.010.

From the express language of PL 83-280, it is clear that the Congress removed Indian activities on the reservation from its general jurisdiction, and placed these activities under the general jurisdiction of the states. Except in the areas expressly reserved in the act, or otherwise expressly reserved by Congress, Congress intended that Indians be accorded the same status as other citizens and residents of a state, and ceded jurisdiction in conformity to this intent. This includes jurisdiction to impose general tax laws on activities or property not expressly prohibited by Congress, including the Washington Cigarette Tax Act.

The fact that Congress expressly legislated with regard to the subject of taxation and Indian self-government in the enactment of PL 83-280 eliminates (1) the contention that these subjects were not part of the subject matter of PL 83-280, and (2) the argument that PL 83-280 was concerned solely with court jurisdiction and not the application of the substantive laws of the states.

If Congress did not intend that PL 83-280 pertain to a state's taxing laws, it would not have been necessary to enact the tax restrictions set forth in subsection (b) of 28 USC § 1360 and subsection (b) of 18 USC § 1162, *supra*.

Furthermore, if Congress had not intended that Indian sovereignty or self-government be subservient to state laws, it would not have been necessary for it to enact 28 USC § 1360(c), *supra*.

It is an anomaly, indeed, for the appellant to argue that the Colville Tribe has the right to tax appellant and his cigarette business and that the state of Washington has no right to impose such a tax. This simply turns the language of subsection (c) into its opposite.

This court, in the early case of *Goudy v. Meath*, 203 U.S. 146 (1906), *supra*, specifically held that the statutory subjection of an Indian to the civil and criminal laws of the state, coupled with a grant of citizenship, subjected the Indian to taxation like any other citizen and resident of a state. In the language of the court:

> "* * * That act, in addition to the grant of citizenship, provided that 'Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' Re Heff, 197 U.S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.
>
> "Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens,—that is, that no exemption exists by implication, but must be clearly manifested. * * *" (203 U.S. at 149.)
>
> "* * * and it is disregarding the act of Congress to hold that the Indian having property is not subject to taxation when he is subject to all the laws, civil and criminal, of the state." (203 U.S. at 150.)

As heretofore indicated, PL 83-280 in express terms provides that the civil laws of the state which are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the state. Thus *Goudy v. Meath*, *supra*, is direct precedent.

The legislative history of PL 83-280 supports the appellees' position that general state tax laws apply to Indians on Indian reservations unless specifically prohibited by Congress.

The House of Representatives and Senate Committee reports pertaining to PL 83-280 are summarized in the opinion of the Supreme Court of Washington in *Tonasket v. State*, 79 Wn. 2d; 607, 488 P. 2d 281 (1971). The court then noted:

> "In Senate Report No. 699, which repeats in substance House Report No. 848 on House Resolution 1063 (which became Public Law No. 83-280), the following statement regarding the act and certain companion legislation appears:
>
> > " 'Your Committee on Interior and Insular Affairs, through its Indian Affairs Subcommittee, and with the continuing cooperation of the Secretary of the Interior and the Indian Bureau, has, during this session, operated in five major areas of legislation affecting the Indians. This legislation, whether before the House or presently under committee consideration, has two coordinate aims: *First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termi-*

nation of the subjection of Indians to Federal laws applicable to Indians as such.'

U.S.C. Cong. & Admin. News 2409 (1953).

"The report drew attention to the fact that, owing to the lack of state jurisdiction to prosecute offenses and limitations upon the federal jurisdiction, as a practical matter enforcement of law within the reservation had been left largely to the Indian groups themselves, and that Indian tribes often are not sufficiently organized to preserve law and order on the reservation. The report said:

" '[C]onsequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.'

U.S. Cong. & Admin. News 2412 (1953).

"Upon the question of civil jurisdiction, the report stated:

" 'Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, *and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.*

" 'After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provisions for all affected States to come within its terms; that the attitude of the various States and the

> Indian groups within those States on the jurisdiction transfer questions should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State Laws.'
>
> U.S.C. Cong. & Admin. News 2412 (1953)." (Emphasis added.) (79 Wn. 2d at 613-614)

As stated by the district court of the Southern District of California:

> "It appears that the purpose of Congress in passing Public Law 280 was to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs. * * *" *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971) at 374.

The fact that the Congress was concerned with civil and criminal law and order problems does not detract from, but rather supports, the argument that the general assumption of jurisdiction by the the state included the assumption of the power of taxation of Indians on Indian reservations except as prohibited. The so-called "law and order hiatus" resulted from a gap between effective tribal self-government and existing federal legislation, and the questionable applicability of state laws to this gap because of the doctrines of implied governmental immunity, Indian tribal sovereignty and federal preemption. The hiatus could be logically resolved

only by clearly defining the role of the states concerning Indian matters.

Nor is there merit to the argument that a state's assumption of criminal and civil jurisdiction over causes of action between Indians on Indian reservations pertains only to court jurisdiction. The question was not a question of a forum, but rather a question of what substantive laws were to apply. Congress had apparently left many areas of civil and criminal jurisdiction to the tribes in areas where the tribes had no effective substantive laws. Obviously, the state courts, in assuming and asserting jurisdiction under PL 83-280, were to apply state substantive laws—not nonexistent federal or tribal laws. The broad grant of jurisdiction by PL 83-280 was intended to fill this gap.

This interpretation of PL 83-280 by reference to its express language and legislative history does not mean that Congress intended to abandon the Indians or that PL 83-280 is to be construed as a termination act or as impliedly repealing any other specific federal legislation concerning Indian affairs.

A fundamental error in appellant's argument and the arguments of his amici curiae pertaining to PL 83-280 is the assumption that the extension of general state taxes to Indians on Indian reservations terminates tribal self-government and federal legislation and policies concerning Indian affairs. Nothing could be further from the truth.

The extension of a state's general criminal and civil jurisdiction, including its tax jurisdiction, to Indians and Indian country is not per se destructive of either tribal self-government or any federal policy not specifically covered by PL 83-280. Colville tribal organization and federal policies concerning it still exist. PL 83-280 reserves intact by its very terms some federal policies, including those pertaining to the tax-exempt status of real and personal property. Further, it preserves intact tribal self-government to the extent not inconsistent with state laws of general application.

Traditionally, in the federal system, various levels of government have exercised the taxing power to the extent not prohibited by the government having the right to preempt the field. Furthermore, the existence of state general jurisdiction, including the taxing power, does not prevent Congress from legislating specifically in any manner that it sees fit concerning Indian affairs, including granting specific tax exemptions such as those preserved in PL 83-280 for trust and restricted property.

In summary, the language of PL 83-280, given its ordinary meaning and effect, and the history of PL 83-280 clearly establish that it encompasses the subject matter of taxation and that it permits the states which assume jurisdiction in accordance with its terms to apply their general tax laws to Indians on reservations. *Goudy v. Meath*, 203 U.S. 146 (1906), *supra*, specifically holds that the power of

the state to tax Indians on their reservations, unless specifically prohibited by Congress, is a natural consequence of Indians being subject to the civil and criminal jurisdiction of such state and of being citizens.

2. **Assuming, Arguendo, That PL 83-280 Does Not Affirmatively Grant the State of Washington Jurisdiction to Impose a Cigarette Tax on Appellant's Sales of Cigarettes to Non-Indians on the Colville Reservation, Appellant is Still Not Entitled to Make Such Sales Free of the Washington Cigarette Tax.**

In order to sustain the validity of the Washington cigarette tax as applied to appellant's sales to non-Indians, it is not necessary to view PL 83-280 as an affirmative grant of taxing jurisdiction. Even if the construction of PL 83-280 presented under the previous heading is incorrect, there still remains the ultimate question concerning its application, *i.e.*, whether an implied Indian immunity from state taxation exists after its passage as a result of either tribal self-government (sovereignty) or federal preemption. It is respectfully submitted that PL 83-280 needs only to remove the umbrella of implied tax immunity accorded Indians in Indian country because of their peculiar relationship with the United States to sustain the state taxing power in question. This PL 83-280 unquestionably does.

This court, in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) rightly noted that:

> "* * * even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. at 75.)

PL 83-280 by express terms preserves only local tribal law which is not inconsistent with state law. It also removes as a right granted or reserved to the federal government the subject matter of general criminal and civil jurisdiction of Indians on Indian reservations.

This federal withdrawal of any general criminal and civil jurisdiction of Indians on the reservations, and the express subrogation of local tribal law on the reservation to state civil laws, remove any barriers to the application of state tax laws to Indians on the reservations.

PL 83-280 precludes any arguments based upon the lack of general jurisdiction in the states over Indian affairs, since Congress has specifically granted this jurisdiction to the states by enactment of PL 83-280. In light of this specific grant of criminal and civil jurisdiction, PL 83-280 eliminates any tax-exemption argument based on federal preemption, apart from specific Congressional prohibitions such as those expressly preserved in PL 83-280. Exemptions from state taxes based on implied immunity of Indians or their reservations as federal instrumentalities are no longer applicable. Tribal sovereignty or self-government arguments advanced

to curtail state taxing power clearly have no merit after a state assumes PL 83-280 jurisdiction.

Thus, irrespective of whether or not PL 83-280 is considered to expressly encompass the subject matter of state taxation, the tax in question is properly imposed.

3. The Case Law Referring to or Interpreting PL 83-280 Supports The Appellees' Position in this Cause.

There is no hint in any of the referred-to cases that the language employed by Congress in PL 83-280 is not to be given literal effect or that PL 83-280 is not concerned with the substance (subject matter) of state criminal and civil laws.[7]

In *Williams v. Lee*, 358 U.S. 217 (1959), *supra*, this court commented on PL 83-280 in the following language:

> "* * * Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the edu-

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[7]While this court has not had before it a PL 83-280 case, it has referred to PL 83-280 in the following cases: *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Williams v. Lee*, 358 U.S. 217 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), *supra*; *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965), *supra*; *Kennerly v. Dist. Ct. of Montana*, 440 U.S. 423 (1971).

The following cases have specifically dealt with PL 83-280 questions: *Quinault Tribe of Indians v. Gallagher*, 368 F. 2d 648 (9th Cir. 1966), *supra*; *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971), *supra*; *Anderson v. Gladden*, 293 F. 2d 463 (9th Cir. 1961); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F. 2d 1184 (9th Cir. 1971); *Kills Crow v. United States*, 451 F. 2d 323 (8th Cir. 1971); *United States v. Burland*, 441 F. 2d 1199 (9th Cir. 1971).

> cational and economic status of the Indians permits the change without disadvantage to them. See H R Rep No. 848, 83d Cong, 1st Sess 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v Georgia had denied." (358 U.S. at 220-221.)

In *Kake v. Egan*, 369 U.S. 60 (1962), *supra*, in commenting on PL 83-280, this court noted:

> "In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat 588, 18 USC § 1162, 28 USC § 1360. * * * Thus Congress has to a substantial degree opened the doors of reservations to *state laws*, in marked contrast to what prevailed in the time of Chief Justice Marshall." (Emphasis added) (369 U.S. at 74.)

In *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), *supra*, the court considered PL 83-280 *in pari materia* with a termination statute. It held that the hunting and fishing rights reserved by treaty survive the Termination Act of 1954 concerning the Menominee Tribe because these rights were reserved in PL 83-280. Obviously, if PL 83-280 and the Termination Act did not pertain to the same subject matter, that is, the withdrawal of federal supervision over Indian affairs on Indian reservations and the application of general state laws to the reservation, it would not have been proper to construe them together.

In *United States v. Burland*, 441 F. 2d 1199 (9th Cir. 1971), *supra*, the Ninth Circuit held that an Indian defendant from a PL 83-280 reservation was properly prosecuted in a federal court for passing a forged check to a non-Indian while on a non-PL 83-280 Indian reservation. It based its decision on the fact that PL 83-280 substituted state jurisdiction for federal jurisdiction on a geographic and subject-matter basis rather than in terms of the individual Indians. The subject matter, of course, is the state's substantive laws as applied to Indians on Indian reservations to the extent jurisdiction is granted by PL 83-280.

The *Rincon Band of Mission Indians* case, *supra*, is direct precedent. In *Rincon*, the district court applied the criminal sanctions of the San Diego gambling ordinance on the basis of California's PL 83-280 jurisdiction to nullify a gambling ordinance enacted by the governing body of the Rincon Indian Reservation. In reaching this result, the court determined that (1) a local ordinance was a "law of the state" within the meaning of PL 83-280; (2) the county gambling ordinance was not an encumbrance on the land within the purview of PL 83-280; (3) the gambling ordinance was not inconsistent with federal statutes, regulations and policies concerning the use of the exempt property and thus not in violation of PL 83-280 restrictions; and (4) the gambling ordinance did not conflict with federal policy of Indian independence and economic self-sufficiency.

The court found that "laws of a state" within the context of PL 83-280 referred also to local ordinances. In this connection, it noted:

> "It appears that the purpose of Congress in passing Public Law 280 was to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs. * * *" (324 F. Supp. at 374.)
>
> "This subject of legislation [regulation of gambling] is one where state and local authorities together prescribe the standards operative in a particular area. It would be as unlawful and as destructive of the full and equal citizenship of Indian citizens to exempt them from local laws on gambling as it would be to deny them specific benefits of county laws solely because of their Indian status. * * *" (324 F. Supp. at 375.)

In pressing the encumbrance argument, counsel for the Mission Band argued "that the gambling ordinance on its face regulates the use of lands of the Rincon Reservation by prohibiting the operation of a card room." In meeting this argument, the court stated:

> "The use of the word encumbrance in series with 'alienation' and 'taxation' indicates that Congress intended by these three words to protect the Indian from himself and swindlers, to prevent the taking of his lands by artifice or by law. * * * Later in the same statute it is provided that nothing in the section 'shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto.' 18 U.S.C. §

1162(b). If all state laws regulating land use were made inapplicable by the earlier language describing encumbrances, then this language would be totally unneeded. In construing a statute, courts whenever possible avoid a construction which renders part of the statute superfluous. * * *" (324 F. Supp. at 376.)

"There is no doubt that the card room would generate certain revenues for plaintiff even if operations there did not reach the impressive proportions seen by the Sheriff in his vision of a 'little Las Vegas'; other activities classified as criminal conduct are even more lucrative. To take plaintiff's argument to its logical conclusion, it seems that the state could only prohibit Indians on trust lands from engaging in unprofitable criminal acts. * * *" (324 F. Supp. at 377.)

In resolving the question concerning the meaning of "any federal treaty, agreement, or statute or with any regulation made pursuant thereto" as used in 18 USC § 1162 (b), *supra*, the court first considered the applicability of an administrative regulation of the Secretary of the Interior which provided that none of the laws, ordinances or other regulations of a state or political subdivision which limit, zone or otherwise regulate the use of real or personal property shall apply to Indian trust lands unless the Secretary "in specific cases" adopts or makes applicable these laws to Indian trust lands. The Secretary had not done this in reference to San Diego County's gambling ordinance. In disposing of this regulation, the court held as follows:

"* * * As the court has decided that this gambling ordinance is not a law regulating the

> use of property, the administrative regulation by its terms is inapplicable to this controversy. "In addition this regulation is void insofar as it purports to enlarge or restrict the scope of jurisdiction afforded by Public Law 280. * * * For a state law to be unenforceable due to conflict, there must exist a conflict between it and a treaty, agreement, statute or a regulation made under the authority of one of these three types of laws. * * *" (324 F. Supp. at 378.)

In resolving the Indian independence and economic self-sufficiency argument based on 28 USC § 1360(c), *supra*, the court held:

> "* * * There is no doubt that a residual sovereignty remains in Indian tribes even in those states where Public Law 280 operates. There is nothing in policy or law, however, which indicates that this limited self government inhering in the Indian tribes may rise to challenge state law. * * *" (324 F. Supp. at 378.)

This case vividly illustrates the kind of hiatus which would result if PL 83-280 is not given application in accordance with its express terms.

Contrary to claims by appellant and his amici curiae, the PL 83-280 cases establish that PL 83-280 does not refer solely to court jurisdiction or solely to the subject matter of law and order. From the cases referred to in this section of the brief, it is clear that Congress intended the subject matter of state civil law, except as expressly restricted by Congress either in PL 83-280 or elsewhere, to extend to Indians on Indian reservations which are subject to PL 83-280.

4. No Specific Federal Legislation Grants Any Immunity From the Imposition of the Washington Cigarette Tax to the Appellant's Retail Cigarette Sales Here in Question.

As heretofore indicated, PL 83-280 negates any argument that the tax in question cannot be imposed on appellant by application of the doctrine of implied governmental immunity or federal preemption or tribal self-government. This follows from the fact that tribal laws are no longer effective to the extent inconsistent with general state laws and the federal government has removed itself from general supervision of Indian affairs on Indian reservations. Specific federal legislation, to the extent it would conflict with any state law, would take precedence. To our knowledge, the only specific federal legislation which could possibly be construed to have any bearing, however remote, is the Indian Traders Act; the exceptions set forth in PL 83-280; and the statutes pertaining to the general financial involvement of Congress in Indian affairs and more particularly the Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 USC § 461, *et seq.*) None of these statutes prohibit the application of state taxes to Indians on Indian reservations.

As already indicated, PL 83-280 preserves tax exemption only for restricted or trust property. The tax in question is not a tax on such property. *Sullivan v. United States*, 395 U.S. 169 (1969); *United States*

v. Detroit, 355 U.S. 466 (1958). It is a general excise tax on cigarette retailing.

Likewise, the Indian Reorganization Act contains no tax exemption provisions except those pertaining to lands or rights in land (for example, 25 USC § 465, *supra*). In fact, the Indian Reorganization Act was designed to remove the Indian and his land from any dependent and wardship relation with the United States while preserving tribal customs and laws. The significance of this legislation is discussed in the Multistate Tax Commission amicus brief filed in this, the *Mescalero* and *McClanahan* causes, *supra*, on pages 16-18, and need not be repeated. As there indicated, the loan fund (25 USC § 470) established by this Act was to further the federal policy of integrating the Indian into American economic life on *equal* footing. To this end, proprietary enterprises were required to be conducted "not inconsistent with the law" (25 USC § 477). Rather than tax immunity, these provisions imply that Indians, in conducting private proprietary businesses, would be subject to the same taxes as their competitors.

Neither is the Indian Traders Act applicable in this cause, for essentially two reasons. First, the activities of the appellant taxed by the state, i.e., the selling of cigarettes to non-Indians, is not within the provisions of the act and the regulatory system established thereunder. Second, even if these activities

be within the scope of the act and the regulatory system. PL 83-280 requires that the effect of the Indian Traders Act be limited to its express scope, i.e., trade regulation, and not be extended, by implication, to the area of state taxation.

The Indian Traders Act contains four sections (25 USC §§ 261-264). Its provisions with respect to traders with Indians are essentially the same as those at the time of its enactment in 1834 (4 Stat. 729), and serve the same purpose as those of the original act, i.e., protection of the Indians from unscrupulous merchants. It does not purport to regulate Indian-operated enterprises selling to a non-Indian public; indeed, its basic purpose is just the reverse, i.e., the regulation of enterprises operated by non-Indians selling to Indians. This becomes clear from a reading of the act.

The first section of this statute (25 USC § 261) provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be *sold to the Indians.*" (Emphasis added.)

The second section (25 USC § 262) provides:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do

so under such rules and regulations as the Commissioner of Indian Affairs may prescribe *for the protection of said Indians.*" (Emphasis added.)

The third section (25 USC § 263) provides:

"The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued."

The fourth section (25 USC § 264) provides in material part:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise *offered for sale to the Indians* or found in his possession, and shall moreover be liable to a penalty of $500: * * *" (Emphasis added.)

We note first that, at least until commencement of this litigation, the Commissioner of Indian Affairs had not exercised the power given by 25 USC § 261 to license any Indian traders in the state of Washington (Single App. 52, Note 4).* That is, he had not

*As stated in a footnote in the Memorandum for the United States as *Amicus Curiae* in support of probable jurisdiction at page 7: "Although not used in the State of Washington, these regulations are in use elsewhere and *serve to protect Indians* against unscrupulous merchants." (Emphasis added.)

even exercised his power over non-Indians selling to Indians.

Secondly, there is not even a suggestion in the Indian Traders Act that it applies to an Indian-operated enterprise selling to the non-Indian public. This conclusion, reached from an examination of the Indian Traders Act, is confirmed by an examination of the regulations adopted thereunder.

To avoid any conflict of interest, the regulations provide that no licenses are issued to persons employed in Indian affairs by the United States (25 CFR 251.5 and 252.4). Federal employees in Indian affairs are allowed to purchase Indian arts and crafts, but not for the purpose of engaging in commercial trade (25 CFR 251.5; cf. 25 USC § 68(a)). Arms and ammunition may not be sold to the Indians by traders except on permission of the federal government (25 CFR 251.8). 25 CFR 251.23 provides that credit given Indians will be at the trader's own risk. 25 CFR 251.24 prohibits traders from paying Indians in token, tickets, store orders or anything of that character. Most importantly, products sold to Indians by licensed traders are required to be good and merchantable, and prices must be fair and reasonable. To accomplish these ends, all business records relating to transactions with Indians must be submitted to the proper federal officials upon request (25 CFR 251.22).

Admittedly, the regulatory system includes certain types of purchases by a non-Indian from an In-

dian. See, e.g., 25 CFR 251.24, *supra*. However, such purchases, we suggest, are those which are made by licensed Indian traders who are engaged in both selling and purchasing activities or, as was undoubtedly the case in 1834, bartering activities. We further suggest that if purchases by the non-Indian public of cigarettes from the appellant are within the scope of the regulatory scheme, it necessarily follows that each individual purchaser must, prior to making a purchase from the appellant, obtain a license from the Bureau of Indian Affairs. For, if anything is beyond dispute with regard to the Indian Traders Act, it is that a non-Indian engaging in Indian trading must obtain such a license. Such a result would not be an entirely happy one for the appellant; for such a requirement would, if enforced by the Bureau of Indian Affairs, effectively shut his business with the non-Indian public completely down and thereby eliminate the tax avoidance which is the state's primary concern.

We would agree with the appellant that requiring each individual purchaser to obtain a license would be absurd; but this absurdity simply shows the basic weakness in the appellant's attempts to stretch the Indian Traders Act beyond its clear scope and his attempt to reverse its real purpose.

In short, there is absolutely nothing in either the Indian Traders Act or the regulations thereunder which in any way controls the activities of the appellant in selling cigarettes to the non-Indian public.

The Bureau of Indian Affairs has in no way attempted to regulate the appellant's cigarette-selling activities, and for good reason; there is no basis for so doing in either the act or the regulations adopted thereunder.

During the course of the present litigation (in February, 1972), the appellant did obtain an Indian trader's license from the Bureau of Indian Affairs (App. Br. 41). We can only speculate as to his reason for so doing. Perhaps the reason stems from the fact that the appellant makes some sales of cigarettes to Indians, and might thereby be required to have a license under the Indian Traders Act, as construed in *United States v. Parton*, 132 F.2d 886 (4th Cir. 1943). This case held that, contrary to what appears to be the position agreed to by the appellant and his amici curiae, a full blood Indian is required to have a license from the Bureau of Indian Affairs under the same conditions as a non-Indian. His sole preference is that he is not subject to the penalties of 25 USC § 264 if he does not have a license when he should have one.

A second, and perhaps more likely reason, is that by having a license the appellant hopes to "bootstrap" himself into the scope of *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965), *supra*, so far as his sales to non-Indians are concerned.

In distinguishing *Warren, supra,* from the present cause, the supreme court of Washington in *Tonasket v. State, supra,* rightly noted:

> " 'The facts of that case, [*Warren*] however, are so different in material aspects from the facts of this case that the law enunciated therein has no application here. There, the company upon which the tax was sought to be imposed had been licensed by the Commissioner of Indian Affairs to trade with the Indians. Here, the plaintiff holds no such license. Furthermore, admittedly, the bulk of his trade is with non-Indians. Thus, the state tax does not interfere with a federal licensing policy as it did in the Arizona case.' " (Single App. 51-52)

In further distinction of the *Warren Trading Post* case, *supra,* the supreme court of Washington noted that in *Warren,* Arizona was not required to assume any responsibilities concerning Indian affairs on reservations, while here, pursuant to PL 83-280, the opposite is true (Single App. 52-53).

The decision in the *Warren* case was limited to *licensed traders trading with Indians* on the Navajo reservation. We are here concerned with an Indian who was not a licensed trader and who was selling to non-Indians.

This court, in the *Warren* case, premised its decision in part on the proposition that to impose a tax on gross income on an Indian trader dealing with the Indians would place an additional burden on the Indian purchasers and:

> "* * * thereby disturb and disarrange the statutory plan Congress set up in order to

protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. * * *" (380 U.S. at 691.)

Thus, this court in *Warren* confirmed our basic point, *i.e.*, that the Indian Traders Act is intended to protect Indian purchasers, and has nothing to do with Indian-operated enterprises selling to the non-Indian public.

For the above reasons, there is no basis in law and fact for the appellant to rely on *Warren Trading Post v. Arizona Tax Com., supra.*

This is particularly true in light of the fact that the state of Washington has assumed general jurisdiction over Indian affairs pursuant to PL 83-280.*

For those states assuming jurisdiction under PL 83-280, the rationale of *Warren Trading Post* that the federal government has preempted the entire field of Indian affairs on Indian reservations is untenable. Since the Indian Traders Act deals with the *regulation* of trade, any exemption from state taxation must be implied from the complete preemption of Congress in the area of Indian commer-

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*In Note [2], in *Warren*, this court noted that:
"Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations. See Organized Village of Kake v Egan, 369 US 60, 72-75, 7 L ed 2d 573, 581-583, 82 S Ct 562; Williams v. Lee, 358 US 217, 219-221, 3 L ed 2d 251, 253, 254, 79 S Ct 269; * * * 18 USC § 1162 (1958 ed.) and 28 USC § 1360 (1958 ed.) (respectively granting certain States criminal and civil jurisdiction over offenses and causes of action involving Indians within specified Indian reservations.)" (380 U.S. at 688.)

cial activity on Indian reservations. We are not here concerned with the subject matter of the Indian Traders Act, namely, the regulation of trade with Indians, but with the subject of taxation, the exercise of which is on an entirely different constitutional footing from that of regulation.

It is a basic principle of constitutional law that the power to regulate commerce by either the federal or the state government does not automatically preclude taxation of that commerce by the other. This court, in *Northwestern States Portland Cement Co. v Minnesota*, 358 U.S. 450 (1959), upheld the imposition of a non-discriminatory properly apportioned state income tax on an exclusive interstate business on the premise that the imposition of the tax was not a regulation of interstate commerce which Congress had the exclusive power to regulate. If the tax were on the privilege of engaging in the commerce, it would be a regulation of the commerce and thus invalid. *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944).

In *Polish Nat. Alliance v. National Labor Rel. Bd.*, 322 U.S. 643 (1944), this court stated:

> "* * * Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, *federal regulation does not preclude state taxation and state taxation does not preclude federal regulation.* Compare, for example, Heisler v. Thomas Colliery Co., 260 US 245, 67 L ed 237, 43 S Ct

83, with Sunshine Anthracite Coal Co. v. Adkins, 310 US 381, 84 L ed 1263, 60 S Ct 907." (322 U.S. at 649.) (Emphasis added)

With this basic distinction between regulation and taxation in mind, both PL 83-280 and the Indian Traders Act can be harmonized, in accordance with the express terms of each. The Indian Traders Act continues in full force and effect within the area of its express scope. But PL 83-280 requires that the Indian Traders Act be confined to its express scope, and not be extended to strike down a state tax on an Indian reservation over which the state has complete jurisdiction pursuant to PL 83-280.

One further observation. Since there is no federal statute which expressly prohibits the imposition of the tax in question, or the Arizona gross income tax considered in the *Warren case, supra,* it is clear that *Warren* is premised, at least in part, on the doctrine of implied governmental immunity stemming from either the concept of tribal self-government or general federal preemption and regulation of Indian affairs on an Indian reservation. PL 83-280, as heretofore indicated, specifically requires that tribal laws inconsistent with general state laws be disregarded, and specifically removes Congress from the field of general preemption of Indian affairs on Indian reservations. PL 83-280 places the states in the position of assuming general jurisdiction. In light of PL 83-280, there is no basis

whatsoever for application of the doctrine of implied governmental immunity.

5. Apart from PL 83-280, Appellant is Not Entitled to The Tax Immunity Here Claimed Because No Immunity From Such Tax Can be Implied.

Appellant is not exempt from the tax in question even if we could assume that PL 83-280 has no bearing on the tax question at issue, i.e., even if PL 83-280 does not contain any affirmative grant of tax jurisdiction and does not remove from the arena of debate the application of the doctrine of implied governmental immunity based on federal preemption and tribal self-government. This follows because this doctrine is no longer applied by this court to grant immunity where the imposition of state taxes has only an indirect or remote effect on the government instrumentality claiming the immunity.

The current status of this doctrine as applied to Indians is set forth on pages 18-27 of the Brief of Amicus Curiae Multistate Tax Commission in this cause and the *Mescalero Apache Tribe* and *Rosalind McClanahan* causes *supra* (Docket Nos. 71-738, 71-834, 71-1031). As indicated therein, so-called implied governmental tax immunity is essentially the same in its application to the federal government, state government and Indian tribes. As appellees' amici curiae contend, the pattern of this court's decisions is to narrow the scope of implied tax immu-

nity primarily through abandonment of the former "economic burden" test.

Apart from PL 83-280, the doctrine of implied governmental immunity is not applicable because, in the absence of federal preemption, the states have a residual jurisdiction over Indians and Indian affairs on the reservation. *Kake v. Egan*, 369 U.S. 60 (1962), *supra*; *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); *State of New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McGowan*, 302 U.S. 535 (1938); *Williams v. Lee*, 358 U.S. 217 (1959), *supra*.

As stated in *State of New York ex rel. Ray v. Martin, supra*:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. 449, quoted with approval in *Kake v. Egan, supra*, 369 U.S. at 74.)

As more recently stated in *Kake v. Egan, supra*:

> "* * * By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. * * *" (369 U.S. at 72.)
>
> "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. * * *" (369 U.S. at 74.)
>
> "These decisions indicate that even on reservations state laws may be applied to Indians

> unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. at 75.)

The question of whether or not the tax in question, apart from PL 83-280, would interfere with reservation self-government or impair a right granted or reserved by federal law is to be answered by application of the implied tax immunity cases such as *Graves v. New York*, 306 U.S. 466 (1939); *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *Oklahoma Tax Com. v. Texas Co.*, 336 U.S. 342 (1949); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania*, 318 U.S. 261 (1943); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *United States v. Detroit*, 355 U.S. 466 (1958) *supra*; *New York v. United States*, 326 U.S. 572 (1946).

In *Helvering*, the court held that a lessee under an oil and gas lease of state school land is not entitled to immunity as a state instrumentality from federal taxation with respect to income derived from operations under the lease. In so holding, the court laid down the following tests:

> "* * * immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of

government. Regard must be had of substance and direct effects. * * *" (303 U.S. at 386)

In *Helvering*, the court further refined the test by stating:

"* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. * * *" (303 U.S. at 386-387)

This same test was applied in *Oklahoma Tax Com. v. Texas Co., supra*, to decide the question of the immunity of a lessee of mineral rights in allotted and restricted land from the payment of nondiscriminatory state gross production and state excise taxes on petroleum produced from such lands (336 U.S. at 343). In upholding the tax, the court noted the uniform pattern which had developed both in the area of state taxation and in the area of federal taxation:

"* * * this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one." (336 U.S. 352)

In *Oklahoma Tax Com. v. United States*, 319 U.S. 598 (1943), in upholding an Oklahoma estate tax against an Indian's estate, this court again affirmed *Helvering, supra*, and there noted:

> "* * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." (319 U.S. at 604)
>
> "* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." (319 U.S. at 608)
>
> "Recognizing that equality of privilege and and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York, 306 US 466, 83 L ed 927, 59 S Ct 595, 120 ALR 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 US 405, 82 L ed 1427, 58 S Ct 969, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 US 277, 83 L ed 1289, 59 S Ct 838, 122 ALR 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623, supra, repudiated former decisions seriously limiting state and federal power to tax. See also Metcalf v. Mitchell, 269 US 514, 70 L ed 384, 46 S Ct 172, and James v.

> Dravo Contracting Co. 302 US 134, 82 L ed 155, 58 S Ct 208, 114 ALR 318. The trend of these cases should not now be reversed." (319 U.S. 610)

These cases and other cases of equal import establish three important principles: First, that implied immunity of Indians from state taxation parallels implied immunity from federal taxation and each is determined by the same test; second, that a tax must have a substantial and direct interference with the functions of government (state, federal or tribal) in order to be invalidated under the doctrine of implied governmental immunity; and third, statutory implied immunity is subject to the same test as constitutional implied immunity.

This court noted in *Oklahoma Tax Com. v. United States*, 319 U.S. 598 (1943), *supra*, that:

> "This Court has repeatedly said that tax exemptions are not granted by implication. * * * It has applied that rule to taxing acts affecting Indians as to all others." (319 U.S. at 606.)

As otherwise stated in *Squire v. Capoeman*, 351 U.S. 1 (1956):

> "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. * * *" (351 U.S. at 6)

In *New York v. United States*, 326 U.S. 572 (1946), *supra*, this court refused to exempt the state

of New York from a federal tax imposed upon the sale of mineral waters when the state engaged in that business. It noted that such a tax does not curtail the business of the state government more than it does a like business of a private person, and that the activity taxed is such that its taxation does not unduly impair the state's functions of government. In the language of the court:

> "* * * But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. Cf. Springfield Gas & E Co. v. Springfield, 257 US 66, 66 L ed 131, 42 S Ct 24; University of Illinois v. United States, supra (289 US at 57, 77 L ed 1028, 53 S Ct 509): Puget Sound Power & L. Co. v. Seattle, 291 US 619, 78 L ed 1025, 54 S Ct 542. If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: 'You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy.' * * *" (326 U.S. at 582.)

Again, in applying the immunity tax exemption principles, this court upheld the imposition of a state income tax upon a competent Indian on his share of restricted mineral resources of the tribe, in *Leahy v.*

State Treasurer of Oklahoma, 297 U.S. 420 (1936). As there noted:

> "The facts are substantially the same as those presented in Choteau v. Burnet, supra, which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." (297 U.S. at 421)

In *Five Civilized Tribes v. Com'r of Int. Rev.*, 295 U.S. 418 (1935), the court declared valid an income tax on income derived from investment of surplus income from restricted lands of an incompetent Indian. In so holding, the court stated:

> "We find nothing in either [federal statutes concerning the exemption of the land] which expresses definite intent to exclude from taxation such income as that here involved. See Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 581, 72 L ed. 709, 714, 48 S. Ct. 333.
>
> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. [Citation omitted.] The taxpayer here is a citizen of the United States, and *wardship with limited power over his property does not, without more, render him immune from the common burden.*
>
> "Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 72 L ed. 709, 48 S. Ct. 333, supra, held that restricted land purchased for a full-blood Creek —ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely

because of the restrictions upon the Indian's power to alienate." (295 U.S. at 421) (Emphasis added.)

Applying these principles to the instant case, it is clear that the tax in question is validly imposed. Its imposition can have only an indirect or remote effect on any governmental operations or policies. It does not any more interfere with the right of Indian self-government or federal policies concerning financial aid to Indians than any of the other taxes held valid in the referred-to immunity cases, and particularly that of the federal tax on mineral waters involved in *New York v. United States, supra.*

In his sales of cigarettes to non-Indian purchasers, the appellant certainly stands in no closer relationship to a governmental function than did the state of New York in *New York v. United States, supra.* To imply immunity to an individual Indian under circumstances where it was denied a sovereign state is not supported by any authority or line of reasoning whatsoever. Appellant is a citizen and resident of the state of Washington. His business is located within the city limits of East Omak, Washington. He is not distinguishable in carrying on his business activities from any other resident or citizen of the state. The fact that he is a full-blood member of the Colville tribe and that he conducts his business on land he has received by restricted deeds from the United States does not imply any immunity from the excise tax law in question.

Inasmuch as the federal cigarette tax is imposed on the cigarettes sold by the Indians on Indian reservations and this tax apparently does not unconstitutionally impair any federal policy pertaining to Indian matters, there is no reason to suppose that imposition of the state tax would unconstitutionally impair any such policy. Equality between federal and state implied immunity requires the same results in imposition of both the federal and state cigarette excise taxes. Except as to the difference in rates, both have an identical effect on the profitability of appellant's cigarette sales activity.

6. Reply to The Argument of Appellant and his Amici Curiae.

Appellant initially argues that the sovereign powers of an Indian tribe to regulate commerce on its reservation and to levy taxes on such commerce may not be impaired by the state unless Congress has given its express consent (App. Br. 12, 16-19). This is an historical argument based on the concept that Indian tribes are sovereign nations, and has been expressly repudiated by decisions of this court and is specifically nullified by the provisions of PL 83-280. *Kake v. Egan*, 369 U.S. 60 (1962), *supra; Williams v. Lee*, 358 U.S. 217 (1959), *supra; State of New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), *supra.*

Secondly, the appellant argues that PL 83-280 was enacted by Congress for the limited purpose of

giving state jurisdiction over criminal and civil litigation arising on Indian reservations (App. Br. 12, 19-26). This argument is contrary to the express terms of PL 83-280 and is not in accord with any decision interpreting the scope and operative effect of this law (see, *supra*, pp. 28-34), or legislative history (see Senate Rept. No. 699, 83d Cong. 1st Sess., p. 6, quoted *supra* at p. 21-22).

It is evident the Congress intended that PL 83-280 subject Indians in Indian country to the subject matter of state civil laws and not merely court jurisdiction. It would make no sense to give state court jurisdiction without having the substantive laws over which that jurisdiction is exercised also applicable.

Thirdly, the appellant argues that Washington excise taxes do not apply on the Colville Indian Reservation since Congress has not specifically granted taxing power to the states (App. Br. 12, 27-38). This argument is premised on the proposition that PL 83-280 does not encompass the subject of taxation. This is not true. Congress had the subject of taxation well in mind in enacting PL 83-280; hence the exceptions to state tax jurisdiction expressed therein. Furthermore, as already indicated, an express grant of taxing power is not needed (see, *supra*, Section 2 at pp. 26-28 and Section 5 at pp. 45-54). All that is necessary for state taxing jurisdiction to be exercised on an Indian reservation over which the

state has assumed jurisdiction pursuant to PL 83-280 is the removal of the implied restrictions on the exercise of that jurisdiction stemming from federal preemption. This PL 83-280 clearly accomplishes. Furthermore, if PL 83-280 were not on the books, the residual jurisdiction of the state and the current limited application of the doctrine of implied governmental immunity would permit the state taxing power to extend to appellant in his sales of cigarettes to non-Indians.

Fourthly, appellant argues that the Washington court's decision would terminate Indian tribal organization, contrary to PL 83-280 which provides for continued tribal existence (App. Br. 29-38). This is a *non-sequitur* argument. The extension of state taxing powers pursuant to the authority granted or the restrictions removed by PL 83-280 does not terminate either tribal self-government or federal involvement in Indian affairs any more than the taxing power of the United States destroys self-government of the states or the taxing power of the states destroys self-government of their political subdivisions.

Appellant's fifth argument that Congress has exclusive jurisdiction of trading on the Colville Indian Reservation (App. Br. 38-41) is refuted not only by the language of PL 83-280 but also by the argument made in this brief that the Indian Traders Act has nothing to do with appellant or his business (*supra;* Section 4, pp. 34-45). Particularly, it has

nothing to do with appellant's sales of cigarettes to non-Indians, which is the subject matter of the controversy in this cause.

As a sixth proposition, appellant argues that the imposition of state excise taxes on Indian personal property is prohibited by PL 83-280 (App. Br. 42-47). This argument involves a misreading of the exception provisions contained in 18 USC § 1162(b) and 28 USC § 1360(b), *supra*. These subsections provide that PL 83-280 does not authorize the states to regulate the use of any trust or restrict personal property "in a manner inconsistent with any federal treaty, agreement or statute or with any regulation made pursuant thereto." Appellant points to no treaty, federal statute, agreement or regulation which prohibits the imposition of a general excise tax.

The fact that RCW 82.32.210 and RCW 82.32-.240 purport to put a lien on all of the taxpayer's property for unpaid tax liability does not invalidate the tax. *United States v. Alabama*, 313 U.S. 247 (1941); *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948). The validity of the imposition of a tax does not turn on whether or not all of the property of the taxpayer is available for enforcement of the tax by lien, attachment, execution, or otherwise.

Squire v. Capoeman, 351 U.S. 1 (1956), *supra*, and *United States v. Rickert*, 188 U.S. 432 (1903), do not stand for the proposition that a general busi-

ness excise tax imposed on the sale of cigarettes is a tax on restricted or trust property of an Indian. The tax exemption found in *Squire* rested upon a specific Congressional enactment, i.e., § 6 of the General Allotment Act, 25 USC § 349. The federal capital gains tax there involved was imposed upon the proceeds of the sale of the land.

United States v. Rickert, supra, is not in point or precedent here. The personal property involved in *Rickert* consisted of cattle, horses and other property of like character which had been issued to the Indians by the United States and which they were using upon their allotments. As to this property, the court stated:

> "* * * It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose." (188 U.S. at 443)

This case, decided in 1903, was decided at a time when this court broadly applied the so-called intergovernmental immunities from taxation. Today, the doctrine has been greatly narrowed. (See, *infra*, pp. 45-54 and the Amicus Brief of the Multistate Tax Commission, pp. 18-27.)

A seventh argument that appellant's cigarette sales should be exempt from the Washington cigarette tax because of the federal policy of promoting the economic welfare of the Indians is also without

merit. The governmental immunity cases no longer follow the "economic burden" test. Furthermore, this argument is contrary to the express language of PL 83-280. Stretched to its ultimate conclusion, the appellant's argument would immunize him from all state taxes as long as the United States government was interested in his welfare. In fact, it would defeat the avowed federal policy of integrating the Indians into the business community on an equal footing with the rest of the citizens and residents of the state.

As an eighth point, the appellant argues that application of the state excise tax in question violates the tribal sovereignty of the Colville Tribes (App. Br. 47-50). This argument is predicated on the erroneous assumptions (1) that PL 83-280 does not require that tribal laws give way to state laws where there is conflict, and (2) that the imposition of a tax on an Indian's business activity is destructive of tribal self-government.

We are here seeking to tax a private individual in his proprietary capacity. It is no more destructive of tribal self-government that the United States' tax imposed in the case of *New York v. United States*, 326 U.S. 572 (1946), *supra*, is destructive of the government of the state of New York. In our federal system, the taxing power is a concurrent power, exercised by various levels of government. The fact that the state cigarette tax is applicable to appellant

does not *per se* prohibit tribal taxation. Preservation of tribal self-government to the extent not inconsistent with state laws as provided for in PL 83-280 does not require that an individual Indian in his personal commercial enterprise be exempt from all state taxes.

Lastly, the appellant argues that Congressional acts and other Indian protections are not repealed or destroyed by implication (App. Br. 50-52). Appellees have not given PL 83-280 any such construction or application. Other federal legislation, however, must be considered in *pari materia* with PL 83-280 to determine the dividing line between the present scope of state responsibility and federal responsibility over Indians in Indian country. Certainly, the long-range objective of congress is to assimilate the Indian into the state and locality of which he is a resident and citizen, while at the same time permitting the Indian to preserve his culture to the extent he desires to do so.

Amici Curiae Brief of Federated Tribes of the Colville Reservation Washington, et al., contains the additional argument that PL 83-280 is an unconstitutional delegation of legislative authority if it transfers authority over "Indian commerce" to the states. This argument is without foundation. This court has held that the power of Congress to regulate commerce includes the power to delegate that power to the states. Contrary to appellant's argument, cases

such as *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), are in point. Congress's authority to regulate commerce among the Indian tribes is no different than Congress's authority to regulate interstate commerce. Both authorities appear in the same clause of the Constitution and are set forth in identical language. The exercise of the power of taxation is not a regulation of commerce unless it is imposed on the privilege of engaging in that commerce, or unduly burdens or discriminates against that commerce as compared to intrastate commerce. In any event, the appellant is not engaged in commerce with the Indian tribes. Appellant is engaged primarily in the commercial activity of selling cigarettes to non-Indians in violation of state law.

Amici curiae for the Colville Tribe, for reasons which are obscure, argue that the factual statement that federal legislation has left the state with no duties or responsibilities respecting the reservation Indians appearing in *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965), *supra*, at page 691 is in error as concerns the state of Washington. Amici curiae then point out that the state of Washington has extended various services to the Indians which are required as a matter of constitutional law. Appellees agree that Washington has furnished considerable services to the Colville Indian Tribe and other Washington tribes and will continue to do so. This simply follows from the fact that Indians are residents and citizens of the state of Washington and

their interests and activities are, to a large measure, commingled with that of the other residents and citizens. This commingling has given rise to the problem at hand. The fact that the Washington Indians enjoy all the rights and privileges which are enjoyed by citizens generally, supports appellees' argument that Indians should be subjected to general state laws, including those pertaining to taxation, particularly after the assumption of jurisdiction under PL 83-280.

Amici curiae for the Washington Indian Tribes by reference to documents in Appendices B, C and D of their brief, argue that the Colville Tribes have contracted to pay for certain local governmental services. This material is not a part of the record in this cause, and any argument pertaining to the same is wholly irrelevant and immaterial to the question here involved.

Amici curiae for these Washington tribes also argue that the state of Washington has never validly assumed jurisdiction over Indian reservations within the state under PL 83-280. This argument is not before the court and is otherwise without merit. *State v. Paul*, 53 Wn 2d 789, 337 P. 2d 33 (1959); *Makah Indian Tribe v. State*, 76 Wn 2d 485, 457 P. 2d 590 (1969), appeal dismissed 397 U.S. 316 (1970); *Quinault Tribe of Indians v. Gallagher*, 368 F. 2d 648 (9th Cir. 1966), *supra*, cert. den. 387 U.S. 907 (1967).

In the Brief for Amicus Curiae National Congress of American Indians, the arguments are made (1) that PL 83-280 creates uncertainty as to what tribal laws remain; and (2) that the reference in 28 USC § 1360(a) to civil laws does not include tax laws since it refers to civil laws of general application to private persons or private property.

In answer to the tribal law question, PL 83-280 preserves Indian tribal law to the extent not inconsistent with any applicable general civil laws of the state.

In answer to the argument concerning private persons or private property, if tax laws are not laws of general application to private persons or private property, it is difficult to see what laws have such application. The Cigarette Tax Act here in question imposes a liability on appellant as a private person in his conduct of a private retail cigarette business.

In the Brief of Native American Rights Fund as Amicus Curiae in Support of Appellant, it is argued that the Washington supreme court improperly construed PL 83-280 as conferring broad power on the state of Washington to terminate the federal regulation and supervision of Indian traders, and that PL 83-280 should not be construed as including the power to terminate previously existing federal Indian policies. While the supreme court of Washington's decision in this cause could be con-

strued to hold that federal legislation concerning Indian affairs was terminated by PL 83-280 subject to the exceptions contained therein, this construction of PL 83-280 is not necessary to sustain the tax in question. As set forth in this brief, PL 83-280, as a minimum, has removed the federal government from any general preemption and has permitted the application of state law unless in conflict with express federal legislation. It also eliminates any tax immunities which can be implied from tribal self-government. PL 83-280 thus removed any immunity implied from federal legislation such as the Indian Traders Act.

Imposition of the state tax in question does not conflict with any federal law such as the Indian Traders Act or the Indian Reorganization Act. State taxation is a concurrent power and can be exercised against private persons or agencies even though these private persons or agencies stand in a special relationship to the federal government as a result of particular federal policies toward them. If Congress wants to exempt appellant's sales from the Washington cigarette tax, it must do so by express legislation. After PL 83-280, no exemption can be implied.

CONCLUSION

The appellant is a citizen and resident of the state of Washington as well as a full blood Colville Indian conducting business on his restricted lands

on the Colville Reservation in the state of Washington. His business consists almost entirely of selling cigarettes at retail to non-Indians.

The state of Washington, in order to effectively enforce its Cigarette Tax Act within its territorial limits, sought to enforce its provisions against the appellant. The appellant resisted this effort and filed a declaratory complaint in this cause alleging that he is free from the imposition of the cigarette tax.

He claims immunity because he conducts his business on restricted lands owned by him on the Colville Reservation and because he is a full blood Indian and a member of the Colville Tribe. He points to no federal statute or treaty which specifically exempts him from the operation of the Washington cigarette excise tax.

Inasmuch as Washington has assumed general civil and criminal jurisdiction over the Colville Tribe pursuant to the authorization contained in PL 83-280, Washington concluded that it was entitled to enforce its cigarette tax law against appellant. The Indian Traders Act and the *Warren* case, *supra*, relied upon heavily by the appellant have no application since we are here concerned with a person not licensed or regulated by the Act's provisions and with the application of the Washington cigarette tax to sales to non-Indians. Furthermore, the state has assumed duties and responsibilities concerning the Colville Tribe and appellant under PL 83-280

which negate applicability of implied immunity based on federal *regulation* of Indian traders.

In order to prevail in this cause, appellant must find that the doctrine of implied governmental immunity extends to him and his commercial activities involving sales to non-Indians. Since no such immunity can be implied, particularly in light of the general jurisdiction granted the state of Washington under PL 83-280, the appellant has made no case for the reversal of the judgment of the supreme court of Washington. Therefore, it is respectfully submitted that this court affirm the judgment of the lower court.

Respectfully submitted,

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APPENDIX A

Chapter 37.12

INDIANS AND INDIAN LANDS—JURISDICTION

37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided fur-*

ther, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted. [1963 c 36 § 1; 1957 c 240 § 1.]

37.12.021 ————Resolution of request—Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12-.060. [1963 c 36 § 5.]

APPENDIX B

82.24.030 Stamps to be affixed—Meter machines authorized. In order to enforce collection of the tax hereby levied, the tax commission shall design and

have printed stamps of such size and denominations as may be determined by the commission, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the commission to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided*, That where it is established to the satisfaction of the commission that it is impractical to affix such stamps to the smallest container or package, the commission may authorize the affixing of stamps of appropriate denomination to a large container or package.

The commission may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto. [1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

APPENDIX C

REGULATIONS OF THE BUREAU OF INDIAN AFFAIRS

Title 25

§ 251.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.
(R.S. 2132; 25 U. S. C. 263)

§ 251.5 Government employees not to trade with Indians except in certain cases.

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person

employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided*, That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further*, That employees in Alaska may in each case make such purchases with

the approval of the Secretary of the Interior where the amount involved exceeds $250, and with the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States employees, Indian blood.* Indian employees of the United States Government, of whatever degree of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative association, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Gov-

ernment must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ..., ...
(Name) (Title)

swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U. S. C. 68a, 87a, 441)

§ 251.8 Regulating sale of arms and ammunition.

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of

articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.